Hii Yii Ann v Deputy Commissioner of Taxation of The Commonwealth of Australia & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCVC-1168–07 OF 2016
NANTHA BALAN J
16 JUNE 2017

Civil Procedure — Jurisdiction — Immunity of foreign sovereign — Plaintiff's tax liability — Whether defendants had sovereign immunity — Whether acts of defendants of governmental nature and character or commercial in nature

The plaintiff was a Malaysian citizen and a tax payer in Malaysia and other jurisdictions. The plaintiff was found to have Australian tax liability. Under the Australian tax legislation, worldwide tax was imposed on persons declared as Australian tax residents. The tax liability of the plaintiff was initially determined by the Australian Tax Office ('the ATO') to be Australian $89,098,935.48 which was subsequently reduced to Australian $49,774,128.20 after objection by the plaintiff. The Australian tax authorities initiated proceedings in Papua New Guinea, where the plaintiff runs his timber business. The plaintiff sought relief from Malaysian courts where he sought various declarations regarding his Australian tax residency and to declare as null and void the decision of the Australian tax authority which decided that the plaintiff was a tax resident in Australia ('encl 2') ('the OS'). In response, the defendants filed the present application ('encl 16') to strike out to and dismiss the OS pursuant to O 18 r 19 (1)(a), (b), (c) or (d) of the Rules of Court 2012. The issues for consideration by the court were: (a) whether the defendants had sovereign immunity; and (b) whether the acts of the defendants were of a governmental nature and character or commercial in nature.

Held, granting order in terms of encl 16 and striking out and dismissing OS with costs of RM30,000 subject to 4% allocator:

(1) The acts of the first and second defendants were clearly not 'commercial' as they were plainly a discharge of functions by the ATO which was a statutory body carrying out its obligations of administering taxation laws of Australia. The ATO's discharge of tax functions was something which a private person was incapable of doing and did not have any private law content or character to bring the present matter under the heading of *acta jure gestionis*. The acts of ATO in carrying out their duties under the relevant taxation laws of Australia undoubtedly fall within the category of governmental authority rather than that of a commercial or private action (see paras 71 & 74).

(2) The actions of the Government of the Commonwealth of Australia, through the ATO and the first and second defendants which were being impunged by the plaintiff through the OS were immune from the jurisdiction of the courts of Malaysia due to sovereign immunity (see para 77).

[Bahasa Malaysia summary

Plaintif adalah warganegara Malaysia dan pembayar cukai di Malaysia dan bidang kuasa lain. Plaintif didapati mempunyai liabiliti cukai Australia. Di bawah perundangan cukai Australia, cukai di seluruh dunia telah dikenakan ke atas orang-orang yang diisytiharkan sebagai pemastautin cukai Australia. Liabiliti cukai plaintif pada mulanya ditentukan oleh Pejabat Cukai Australia ('PCA') berjumlah $89,098,935.48 yang kemudiannya dikurangkan kepada $49,774,128.20 Australia selepas bantahan oleh plaintif. Pihak berkuasa Australia telah memulakan prosiding di Papua New Guinea, di mana plaintif menjalankan perniagaan kayu balak. Plaintif memohon relief dari mahkamah Malaysia di mana dia memohon pelbagai deklarasi berkaitan residensi cukai Australianya dan untuk mengisytiharkan keputusan pihak berkuasa cukai Australia sebagai terbatal dan tidak sah yang memutuskan bahawa plaintif adalah pemastautin cukai di Australian ('lampiran 2') ('SP'). Sebagai jawapan, defendan-defendan telah memfailkan permohonan ini ('lampiran 16') untuk membatalkan dan menolak SP itu menurut A 18 k 19(1)(a), (b), (c) atau (d) Kaedah-Kaedah Mahkamah 2012. Isu-isu untuk dipertimbangkan oleh mahkamah adalah: (a) sama ada defendan-defendan mempunyai kekebalan berdaulat; dan (b) sama ada perbuatan defendan-defendan bersifat dan bercirikan kerajaan atau bersifat komersial.

Diputuskan, memberikan perintah mengikut terma lampiran 16 dan membatalkan dan menolak SP dengan kos RM30,000 tertakluk kepada 4% alokatur:

(1) Perbuatan defendan-defendan pertama dan kedua jelas bukan 'commercial' kerana ia jelas fungsi-fungsi yang dilaksanakan oleh PCA yang merupakan badan berkanun yang menjalankan obligasinya mentadbir undang-undang percukaian Australia. Fungsi-fungsi pelepasan cukai PCA adalah suatu yang mana seseorang persendirian tidak mampu lakukan dan tidak mempunyai apa-apa kandungan atau ciri-ciri undang-undang persendirian untuk memulakan perkara ini di bawah tajuk *acta jure gestionis*. Perbuatan PCO dalam menjalankan kewajipan mereka di bawah undang-undang percukaian Australian tanpa diragui terjatuh dalam kategori pihak berkuasa kerajaan dan bukan tindakan komersial atau persendirian (lihat perenggan 71 & 74).

(2) Tindakan Kerajaan Komonwel Australia, melalui PCO dan defendan-defendan pertama dan kedua yang dipersoalkan oleh plaintif melalui SP adalah kebal daripada bidang kuasa mahkamah Malaysia

A kerana kekebalan berdaulat (lihat perenggan 77).]

Notes

For a case on immunity of foreign sovereign, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 6262.

B

Cases referred to

Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor [1990] 1 MLJ 475; [1990] 1 CLJ Rep 77; [1990] 1 CLJ 878, SC (refd)

Jones v Ministry of Interior of the Kingdom of Saudi Arabia and another [2007] 1 All ER 113, HL (refd)

C

Maldives Airports Co Ltd and another v GMR Malé International Airport Pte Ltd [2013] SGCA 16, CA (refd)

Rahimtoola v H E H The Nizam of Hyderabad and Others [1958] AC 379, HL (refd)

D

Village Holdings Sdn Bhd v Her Majesty The Queen in right of Canada [1988] 2 MLJ 656, HC (refd)

Walker v The State of New South Wales (1994) 182 CLR 45, HC (refd)

Legislation referred to

E

Commonwealth of Australia Constitution Act s 51(xix)
Income Tax Act 1967 s 7
Income Tax Assessment Act 1936 [AUS] ss 6, 6(1), 136AA
Income Tax Assessment Act 1997 [AUS]
International Tax Agreement Act 1953 [AUS]

F

Public Service Act 1999 [AUS]
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d)
Rules of the High Court 1980 O 66
Taxation Administration Act 1953 [AUS] s 8

G *Alvin John (Sarita Khandhar, Shaik Abdullah, Mohd Rizal and Ideyani with him) (Alvin John & Partners) for the plaintiff.*

DP Naban (S Saravana Kumar, Heng Jia and Josiah Lim with him) (Lee Hishammuddin Allen & Gledhill) for the defendants.

H **Nantha Balan J:**

[1] These are my grounds of judgment in respect of an application by the defendants ('encl 16') to strike out and dismiss the originating summons dated 22 July 2016 ('encl 2') ('the OS'), pursuant to O 18 r 19(1)(a) or (b) or (c) or (d) of the Rules of Court 2012 ('the ROC'). The striking out application is predicated on, inter alia, a plea of 'sovereign immunity'. The issue is whether by reason of the defendants' plea of sovereign immunity, this court should decline jurisdiction to hear the claim by the plaintiff and strike out/dismiss the OS accordingly.

I

[2] Briefly stated, the plaintiff is a Malaysian citizen and a tax-payer in Malaysia and in other jurisdictions. He is a multi-jurisdictional businessman with a considerable reputation. He has assets and conducts business in various jurisdictions. His ex-wife and children are in Australia, predominantly for the children's educational purposes. He is presently in a rather invidious position as he finds himself inextricably entangled with the tax authorities of Australia. His principal grievance is that he has been wrongly and unfairly declared by the Australian tax authorities as a tax resident for Australian tax purposes.

[3] Under the Australian tax legislation, 'world-wide tax' is imposed on persons who are declared as Australian tax residents. As a result, upon being determined to be an Australian tax resident, the plaintiff was assessed to tax on income derived from his businesses outside as well as within Australia. Thus, the plaintiff's Australian tax liability was initially determined by the Australian Tax Office ('ATO') to be Australian $89,098,935.48 and after objection by the plaintiff, was subsequently reduced to Australian $49,774,128.20. The plaintiff judicially challenged the imposition of world-wide tax by the Australian tax authorities through the process of objections and appeals before the Australian tribunals and the courts. The chronology of the plaintiff's journey through the tax tribunals and courts in Australia and ATO's enforcement proceedings in Papua New Guinea are as stated in the chronology of events in para 20 of this judgment.

[4] The Australian tax authorities have since initiated enforcement proceedings in Papua New Guinea, where the plaintiff runs his timber business. The plaintiff now seeks reliefs from the courts in Malaysia. He filed the OS on 22 July 2016 wherein he sought various declarations with regard to his Australian tax residency and to declare as null and void, the decision of the Australian tax authority which decided that the plaintiff is a tax resident in Australia.

[5] In his affidavit in support of the OS, the plaintiff made an impassioned plea for intervention by this court so as to ensure that Malaysian citizens and tax payers like him are not subjected to the same fate. The plaintiff's affidavit reads as:

> 104. It is public knowledge that the Australian government, their business community and universities alike have consistently invited Malaysians to either invest or educate our children in Australia. Many Malaysians like me have accepted this invitation to do so but then the Australian Authorities have taken advantage of the situation by unilaterally deciding subsequently that these Malaysians now can be deemed Tax Resident's of Australia by virtue of assets owned in Australia or visits to meet their children in Australia. It is not just superfluous but an under handed tactic by the Defendants to earn taxes from foreign nationals. If left unheeded many Malaysians and citizens of other nations will be trapped to pay unwarranted taxes to

Australia. This is an act of tacit deceit by the Defendants.

This is a matter of utmost public interest and I urge the Malaysian Courts to take the necessary measures to protect persons like me being citizens of Malaysia from being financially, physically and emotionally destroyed by the wanton acts of the Defendants.

THE DEFENDANTS

[6] The third defendant ('D3') is the Federal Government of Australia and it asserts that it is entitled to sovereign immunity. It is contended that the first defendant ('D1') and second defendant ('D2') are statutorily responsible for carrying out public functions and for public purposes, for and on behalf of D3, through the ATO. According to the defendants, it is in respect of these public actions and/or functions that this claim has been made by the plaintiff against them via the OS. As such, the defendants claim that they are entitled to sovereign immunity.

[7] The defendants maintain that this court does not have jurisdiction and/or ought to decline and/or disclaim jurisdiction by reason of the fact that each of the defendants are entitled to sovereign immunity.

THE PLAINTIFF

[8] I will now refer to some specific details about the plaintiff, his status and business activities. At all material times the plaintiff was/is a Malaysian citizen and holds a valid Malaysian passport, Malaysian identity card and a Malaysian birth certificate. He is an international businessman and has business interests and assets in a number of countries namely Papua New Guinea ('PNG'), Hong Kong, Philippines, Malaysia, Singapore and Australia.

[9] In pursuing the expansion of his business interests, the plaintiff inevitably spends considerable time overseas, away from his home in Malaysia to look after his foreign businesses. As for his investments and presence in Australia, the plaintiff asserts the following facts:

(a) at all material times the plaintiff declared his tax status as a tax resident of Malaysia and for his income from foreign sources he has always declared his status to the foreign countries including Australia, as a 'non-tax resident';

(b) this is in line with his express intent to maintain his Malaysian legal domicile and residence. Sometime in the late nineties the plaintiff who was living in PNG with his family at that time, decided to send his children to Australia, for their educational purposes;

(c) his then wife (estranged since 2001) followed their children to look after them as they were still very young. The plaintiff invested in a home for his family to stay in Australia and subsequently purchased other Australian properties as investments;

(d) the plaintiff did not follow his family to Australia and remained in PNG to look after his timber business there. He made sporadic visits to see his family whenever time permitted;

(e) the primary purpose of his then wife and children moving from PNG to Australia was for the children's education; and

(f) according to the plaintiff, it was never his intention to make Australia his home at any time whatsoever. He maintains that his visits to Australia were short, intermittent and never exceeding half a year which is a requirement to deem a person as a tax resident.

TAX REPORTING — AUSTRALIA

[10] Turning now to the issue of tax reporting, throughout the relevant period from 2001–2009 ('the relevant years'), the plaintiff filed his tax returns in Australia for the income earned in Australia as a *non-tax resident* of Australia:

(a) during the relevant years he filed his tax returns in Malaysia as a tax resident of Malaysia. At all times during this period there were no issues or disputes in relation to his tax resident status;

(b) the plaintiff claims that during the relevant years, Australia accepted the fact that the plaintiff's tax residency is Malaysia;

(c) under Australian domestic tax laws, a person is deemed a tax resident, if his physical presence in Australia is more than half a year in the assessment year; and

(d) the plaintiff claims that for the most part, he was not in Australia for more than half a year. According to the plaintiff, he has lived outside Australia for the most part during the relevant years.

AUSTRALIAN TAX BILL — THE PLAINTIFF'S GRIEVANCE

[11] The nub of the plaintiff's claim or grievance is that in 2010 a retrospective audit was conducted by the ATO and they unilaterally decided in 2013 that the plaintiff is a resident of Australia and not Malaysia under Australian tax laws. The plaintiff alleges that the ATO have wrongfully determined that the plaintiff has abandoned his domicile of origin in Malaysia, for a domicile of choice in Australia.

[12] As such, the ATO levied the plaintiff with a tax bill for the relevant years

in the amount of Australian $89,098,935.48 which was later reduced to Australian $49,774,128.20 upon an objection by the plaintiff. In para 12 of the plaintiff's affidavit in support of the OS, he crystallised his grounds for impugning the ATO's decision and said as follows:

> 12. The decision of the ATO in declaring that I am a tax resident of Australia for the relevant years have in fact by implication declared that I am not a tax resident of Malaysia and that the Malaysian tax authority have no rights over my taxable income. The ATO has unilaterally reversed my tax residency status from being a Malaysian tax resident to being an Australian tax resident. This action by the ATO is beyond their lawful jurisdiction.
>
> They have arbitrarily usurped the rights and powers of the Government of Malaysia being a sovereign country having rights to govern and protect its citizens like me.

[13] The plaintiff also claims that the defendants had violated the international tax treaty between Australia and Malaysia, namely, the Australia-Malaysia Dual Tax Agreement 1980 ('the DTA').

[14] The plaintiff's complaint in this regard may be gleaned from the following paragraphs of his affidavit in support of the OS:

> 73. The Defendants failed to appreciate that the Australian Income Tax Assessment Acts of 1936 and 1997 ('ITAA 1936' and 'ITAA 1997') are subservient to their International Tax Agreements Act 1953 ('ITAA 1953') to the extent of any inconsistency when dealing with taxation of a foreign national. In fact the ITAA 1953 gives statutory effect and the force of law to the Australia-Malaysia Dual Tax Agreement 1980. I am advised that the ATO had failed to conform to the spirit and intent of the Malaysian Tax Agreement in making their arbitrary and unjust decision against me.
>
> 74. As I own multiple residences in many countries, The Defendants failed to apply the tie breaker tests as found in Article 4 of the Malaysian Dual Tax Agreement to determine my tax residency status. This act of the Defendants is a breach of an international contract entered into between 2 sovereign countries and a usurpation of my constitutional right as a Malaysian citizen domiciled in Malaysia too.
>
> 75. For the six income years ending 30 June 2001 to 30 June 2004 and 30 June 2007 to 30 June 2009, I had lodged my Australian Tax Returns on the basis that I was a Non-Resident of Australia. In the converse throughout these income years I had lodged my Malaysian Tax Returns on the basis that I am a resident of Malaysia.
>
> *Now shown to me and marked as exhibits 'HYA-32' and 'HYA-33' are the returns lodged in Australia and Malaysia between 2001-2006 respectively.*
>
> 76. In my Australian returns I had included all my Australian sourced income and the Defendants had issued assessments to tax for each of the assessment years.
>
> 77. For the years 2005 and 2006 I had notified the ATO that I was a non-resident of Australia and had no Australian sourced income. On that premise I was not required to lodge Australian returns for this period and I was not issued with any

assessments for those years. However I had lodged Malaysian Tax returns as a resident of Malaysia.

THE OS

[15] In the OS, the plaintiff seeks to impugn the decision of the ATO dated 20 December 2013. By the said decision, the ATO had imposed a tax assessment against the plaintiff for the relevant years for an amount which was later (on objection by the plaintiff) reduced to Australian $49,774,128.20. According to the plaintiff, in deciding that the plaintiff had abandoned his Malaysian domicile in favour of Australia, the ATO had unilaterally and erroneously changed the plaintiff's tax residency status from being a tax resident of Malaysia to being a tax resident of Australia for the relevant years. The plaintiff has alleged that the defendants have failed and/or neglected and/or breached the spirit and intent of the DTA. And so the plaintiff says that the Malaysian court should adjudicate on the imperative question: whether the defendants had unilaterally altered the private law rights of the plaintiff who was and is a foreign citizen and deem him a resident and domicile of the foreign state for the purpose of earning revenue on a worldwide basis without concurrence and approval of the forum state where the citizen has his original residence and domicile, namely Malaysia.

RELIEFS SOUGHT IN THE OS

[16] Hence, in encl 2 ('the OS'), the plaintiff seeks to obtain the following orders:

(a) declaration that the plaintiff is a domicile of Malaysia between the years 2001–2009;

(b) declaration that between the years 2001–2009 the plaintiff is a tax resident of Malaysia;

(c) declaration that the decision of the ATO dated 20 December 2013 in deciding that the plaintiff abandoned his Malaysian domicile in favour of Australia is null and void;

(d) declaration that the decision of the ATO dated 20 December 2013 in unilaterally changing the plaintiff's tax residency status from being a tax resident of Malaysia to being a tax resident of Australia between the years 2001–2009 is null and void and contrary to law;

(e) by virtue of prayers (a), (b), (c) and (d) above, a declaration that the ATO's decision dated 20 December 2013 in imposing a tax assessment of Australian $49,774,128.20 for the assessment years ending 2001–2009 is contrary to law and is null and void;

(f) declaration that the defendants have failed and/or neglected and/or breached the spirit and intent of the dual tax agreement executed between Australia and Malaysia in 1980;

(g) declaration that the defendants actions in commencing, proceeding, prosecuting and enforcing their claim and suits in Australia against the plaintiff is contrary to acceptable international principles of natural justice enshrined in the Malaysian Federal Constitution and the United Nations Universal Declaration on Human Rights; and

(h) declaration that the decision of the ATO dated 20 December 2013 against the plaintiff is contrary to public interest.

STATUS OF THE DEFENDANTS — SOVEREIGN IMMUNITY

[17] I turn now to the application by the defendants to strike out and dismiss the OS on the basis of a plea of 'sovereign immunity'. The brief grounds in support of the defendants' application are as follows:

(a) D3 is the Federal Government of Australia and is entitled to sovereign immunity;

(b) D2 is the head of the ATO, which is a statutory agency of D3 for the purposes of the Public Service Act 1999 (Cth);

(c) D2 is appointed by the Governor-General of D3 and is responsible for the general administration of Income Tax Assessment Act 1936 (Cth), the Income Tax Assessment Act 1997 (Cth) and Taxation Administration Act 1953 (Cth);

(d) D1 is also a statutory office holder and a delegate of D2 pursuant to s 8 of the Taxation Administration Act 1953 (Cth); and

(e) both D1 and D2 are statutorily responsible for carrying out public functions and for public purposes and it is in respect of these actions and/or functions that this claim has been made against them and are thus entitled to sovereign immunity.

[18] Hence, the defendants maintain that this court does not have jurisdiction and/or ought to decline and/or disclaim jurisdiction by reason of the fact that each of the defendants are entitled to sovereign immunity. As for recognition of D3 as a sovereign state, it is in evidence that the DYMM Seri Paduka Yang Dipertuan Agong, as the Head of the Federation of Malaysia has issued a certificate recognising D3 as a sovereign state.

CHRONOLOGY OF EVENTS

[19] I turn now to the chronology of key events which took place in Australia and in PNG. I should add that these are not in dispute:

Proceedings in Australia

From 14 April 2010	First defendant conducted a tax audit on the Plaintiff for the years of assessment ('YA') 2001–2009. (Exh HYA-1 of encl 1)
30 July 2012 to 1 August 2012	Consequent to the tax audit, the second defendant raised assessments for YA 2001 to 2009 ('Assessments'). (Exh HYA-2 of encl 1, HYA-5 of encl 1 and D-12 of encl 21)
17 September 2012	Plaintiff objected to the Assessments to the 2nd Defendant ('Plaintiff's Part IVC Objection'). (Exh HYA-34 of Encl 1, D-20 of encl 21)
20 December 2013	Objection was allowed in part. (Exh D-21 of encl 21)
16 January 2014, 17 January 2014 & 25 February 2014	Second defendant subsequently issued amended assessments. ('Amended Assessments'). (Exh HYA-35 of encl 1; D-22 of encl 21)
Australian Proceeding 1	
14 February 2014	Plaintiff commenced action against second defendant in respect of the amended assessments. (Exh HYA-8 of encl 1)
8 February 2016	Federal Court of Australia allowed the second defendant's application for security for costs. (Exh D-24 of encl 21)
22 February 2016	Plaintiff did not comply with the court order and the proceeding was deemed dismissed. (Exh D-25 and D-26 of encl 21)
Australian Proceeding 2	
17 February 2014	Plaintiff applied to Administrative Appeals Tribunal on penalties and interest imposed by virtue of the Amended Assessments.
1 July 2016	Proceedings were withdrawn by the plaintiff. (Exh D-27 of encl 21)
Australian Proceeding 3	
26 November 2014	Plaintiff commenced judicial review proceedings against first defendant on the Amended Assessments. (Exh HYA-8 of encl 1)
23 April 2015	Proceedings were dismissed. (Exh D-23 of encl 21)
Recovery Action in Australia	
28 June 2013	First defendant commenced proceedings for recovery of amended assessments against the plaintiff.

11 May 2015	By consent of parties, the first defendant obtained judgment by consent against the Plaintiff before the Supreme Court of Queensland in respect of outstanding tax, penalties and interest due by the Plaintiff to the 3rd Defendant, payable to the second defendant and recoverable by the first defendant in respect of Australian Proceeding 1. (Ex D-31 of encl 21)
17 February 2015	Plaintiff's stay application was dismissed. (Exh D-2 of encl 17, D-32 of encl 21)
8 March 2016, 13 April 2016	First defendant applied for enforcement warrants for seizure and sale in respect of the plaintiff's property (Exh D-34 and D-35 of encl 21)
Papua New Guinea ('PNG')Proceedings	
11 February 2016	By virtue of the PNG Reciprocal Enforcement of Judgements Act (Chapter 50), which accords for legislative reciprocity on collection of taxes as legislated by both the PNG and Australian Parliaments, the second defendant applied to register the consent judgment before the Supreme Court of Queensland in the PNG National Court of Justice at Waigani.
24 March 2016	Judge Hartshorn of the PNG National Court of Justice ordered the registration of the consent judgment and sealed a notice of registration of judgment which was served on the plaintiff on 10 June 2016. (Exh D-43 of encl 21)
15 July 2016	First defendant filed a creditor's petition seeking orders that the Plaintiff may be adjudged insolvent ('PNG Creditor's Petition').
18 November 2016	Court dismissed a motion by the plaintiff to, inter alia, set aside the order and stay the PNG Court Proceedings.
13 February 2017	PNG's Creditor's Petition is listed for hearing.
(B) Proceedings Filed in Malaysia	
22 July 2016	Plaintiff filed the originating summons (Encl 2) against the defendants.
16 August 2016	High Court granted leave to the plaintiff to serve the Notice of Originating Summons out of Jurisdiction. (encl 9)
5 September 2016	Defendant's solicitors appeared under protest (Exh D-1 of encl 17) as Defendants intended to raise the issue of sovereign state immunity.
4 November 2016	Yang Di Pertuan Agong issues a certificate to recognise the Commonwealth of Australia as a Foreign Sovereign State. (Exh D-1 of encl 46)

THE ARGUMENTS

[20] In amplification of the argument that D1 and D2 were carrying out public (governmental) duties/functions, counsel submitted that D1 and D2 at all times carried out their duties as taxation officers whilst administering Australian taxation laws. It was submitted that the plaintiff bears the burden of

proving that the defendants had acted in ways by which his rights were violated. The crux of plaintiff's argument is that the D1 and D2 had acted beyond their authority and jurisdiction and therefore acted illegally, because Australian laws are purportedly not applicable to plaintiff as he is a foreign citizen.

[21] In this regard, the plaintiff's arguments are based on cl 5 of the Commonwealth of Australia Constitution Act which provides that all laws made by the Parliament of Australia shall be binding on people of Australia. The plaintiff contended that he is not a 'person of Australia', and therefore the defendants cannot claim tax from him under Australian taxation laws.

[22] But, according to the defendants, cl 5 of the Commonwealth Constitution does not limit the operation of the laws of the Commonwealth of Australia by reference to those individuals who are Australian citizens. For example, s 51(xix) of the Commonwealth of Australia Constitution Act empowers the Parliament of the Commonwealth of Australia to legislate with respect to aliens and non-citizens generally. In this regard, counsel for the defendant referred to the case of *Walker v The State of New South Wales* (1994) 182 CLR 45 where the High Court of Australia held that foreign citizens are subject to Australian laws when present in Australia. Mason CJ made this observation at p 49:

> The general rule is that an enactment applies to all persons and matters within the territory to which it extends ... The rule extends not only to all persons ordinarily resident within the country, *but also to foreigners temporarily visiting*.

[23] Counsel for the defendants argued that Australian tax residents are taxable in Australia on their Australian sourced income and world-wide income.

[24] Accordingly, it was contended that D1 and D2 acted lawfully and well within their authority under Australian taxation laws when assessing the plaintiff to income tax. D1 determined that the plaintiff was a 'resident of Australia for tax purposes' during the relevant years. However, that determination has nothing to do with plaintiff's status as a Malaysian citizen.

[25] The defendants had never questioned the Malaysian citizenship of the plaintiff, nor was it necessary to do so for the purposes of raising the tax assessments in respect of the plaintiff.

[26] Counsel said that similar to the Malaysian taxation laws, under the Australian taxation laws, the citizenship of a person is not a determinative factor to be considered in determining whether that person was a tax resident in Australia during a financial year. Counsel for the defendants also said that, a

A person does not necessarily have to be a citizen of Australia in order to be taxed as an Australian tax resident. Similarly, a foreign citizen can be taxed in Malaysia if he or she meets one of the residency tests provided under s 7 of the Income Tax Act 1967.

B **[27]** Counsel for the defendants added that just because a foreign citizen is determined as a tax resident in Malaysia, it does not mean that he or she has been unilaterally converted to becoming a Malaysian citizen or domicile.

C **[28]** According to counsel for the defendants, there is no single argument with merits that could suggest that the acts of defendants amounted to violations of the plaintiff's rights. Counsel for the defendants emphasised that the plaintiff was given reasonable time and every opportunity to challenge the ATO's decision through the tax tribunals and courts in Australia.

D **[29]** In this regard, it was emphasised that the plaintiff had exhausted all the legal avenues available before the courts and tribunals in Australia to challenge the ATO's amended assessments.

E INTERNATIONALISATION OF ISSUES — A BAR TO SOVEREIGN IMMUNITY?

[30] The plaintiff alleges that the issue of sovereign immunity should not be considered because the defendants have 'internationalized' the issue by
F imposing 'world-wide tax' on the plaintiff and also by seeking to enforce the Australian judgment in PNG. In this regard, D2 did in fact proceed to register the consent judgment before the Supreme Court of Queensland and, accordingly, the PNG National Court of Justice at Waigani ordered the registration of the consent judgment on 24 March 2016.

G **[31]** However, it was argued for the defendants that the so-called 'internationalization of issues' is not an exception to the rule of sovereign immunity.

H LACK OF COURTESY — AN EXCEPTION TO SOVEREIGN IMMUNITY?

[32] The plaintiff further alleges that Australia has demonstrated a lack of courtesy towards Malaysia and therefore the Malaysian Courts should not
I afford the defendants with the courtesy of sovereign immunity (see encl 32, at p 28, para 55).

[33] In response, it was argued for the defendants that following a contested hearing, the judgment of the Federal Court of Australia dated 23 April 2015 in

respect of Australian Proceeding 3 dismissed the plaintiff's claim, concluding that there was no maladministration on the part of D2 (see exh D8 of encl 17 at p 183 at paras 227–230).

[34] It was also argued for the defendants that the alleged 'lack of courtesy' is neither a legal nor legitimate exception to the rule of sovereign immunity. In any event, there has been no adverse behaviour on the part of the defendants to warrant the inference of 'lack of courtesy'. It was contended that the defendants had administered the Australian taxation laws lawfully and assessed the plaintiff to tax under those laws. The plaintiff also exercised in Australia (unsuccessfully) his full rights of review in relation to those assessments. Further, the defendants argued that as an aggrieved party, the plaintiff was entitled to engage the appeal processes in article 24(1) of the DTA being the appropriate mechanism for the respective governments of Australia and Malaysia to deal with such issues.

[35] Counsel for the defendants pointed out that despite being represented by legal counsel, the plaintiff did not engage the procedure provided for in article 24(1) and the time available to him to do so, has now expired.

[36] For the plaintiff, it was argued that the unilateral decision by the defendants in effect alters the plaintiff's personal status and his personal rights in law as the decision in fact means the defendants have deemed that the plaintiff treats Australia as his home and intends to reside in Australia permanently which is contrary to the plaintiff's express and unequivocal assertion that his allegiance is with Malaysia. According to the plaintiff, he never intended to make Australia his home.

[37] It was emphasised for the plaintiff that his short or intermittent physical presence in Australia during the relevant years clearly demonstrates his intention of never intending to make Australia his home apart from all the other cogent supporting evidence of his Malaysian citizenship, homes in Malaysia and other parts of the world and the fact that his children and his estranged wife remain Malaysian citizens. Counsel for the plaintiff submitted that the defendants' unilateral decision means that the plaintiff being a citizen of Malaysia will now be treated as a resident and domicile of Australia for the relevant years and will have to pay tax to Australia on a worldwide basis for all the income that he has earned outside Australia.

[38] He said that if the ATO's decision stands, then from an international law and constitutional law perspective, Australia is vested with extra-territorial powers to decide on the legal personal status of citizens of Malaysia without the approval and consent of the Malaysian government. Continuing with his submission, counsel for the plaintiff said that if the ATO's decision stands then

the impact on the plaintiff will be severe as Australia has actually deemed him to be a legal resident and a legal domicile of Australia contrary to his intention and stated position, which would adversely affect his vested personal legal rights as a Malaysian citizen. The plaintiff claims that the result of the ATO's decision is that the plaintiff's allegiance is to Australia and not Malaysia. Therefore, according to counsel, a Malaysian citizen having a domicile in Malaysia and holding a tax residency in Malaysia has been deemed unilaterally by the defendants that his allegiance to pay resident tax is now with Australia only.

[39] Counsel for the plaintiff added that Malaysia has signed an international tax agreement with Australia which has since been ratified by the Australian Parliament and enacted into law by virtue of the International Tax Agreement Act 1953, which is a bilateral agreement expressing cooperation and mutual assistance whenever required. In the present case, Australia has unilaterally exercised extra-territorial jurisdiction without respecting Malaysia's sovereign rights by going after a Malaysian citizen and to claim personal rights over him without reference to Malaysia.

[40] According to the plaintiff, the ATO has unilaterally determined as a matter of fact and law that the plaintiff is a legal resident of Australia based upon personal and economic ties. Applying the tie breaker test under the DTA, the ATO subjectively determined that the plaintiff is a legal resident of Australia and not Malaysia. The 'tie breaker' test is encapsulated in article 4 of the DTA and it reads as:

> Article 4
>
> RESIDENCE
>
> (1) For the purposes of this Agreement, a person is a resident of one of the Contracting States:
>
> (a) in the case of Malaysia, if the person is resident in Malaysia for the purposes of Malaysian tax; and
>
> (b) in the case of Australia if the person is a resident of Australia for the purpose of Australian tax.
>
> (2) Where by reason of the preceding provisions an individual is a resident of both Contracting States, then his status shall be determined in accordance with the following rules:
>
> (a) he shall be deemed to be a resident solely of the Contracting State in which he has a permanent home available to him;
>
> (b) if he has a permanent home available to him in both Contracting States, or if he does not have a permanent home available to him in either of them, he shall be deemed to be a resident solely of the Contracting State in which he has an habitual abode;

(c) if he has an habitual abode in both Contracting States, or if he does not have an habitual abode in either of them, he shall be deemed to be a resident solely of the Contracting State with which his personal and economic relations are the closer.

(3) In determining for the purposes of paragraph 2 of the Contracting State with which an individual's personal and economic relations are the closer, the matters to which regard may be had shall include the citizenship of the individual.

(4) Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident solely of the Contracting State in which its place of effective management is situated.

[41] Hence, the plaintiff complains that the ATO had unilaterally and erroneously determined as a matter of fact and law that the plaintiff has no intention to live in Malaysia and that he is not domiciled in Malaysia and has abandoned Malaysia as his domicile in favour of a domicile of choice in Australia. As such, it was submitted for the plaintiff that the decision by the ATO is highly prejudicial as the ATO being a foreign state agency, played the role of judge, prosecutor and jury against a Malaysian citizen and unilaterally decided to alter the personal law and personal legal status of a Malaysian citizen without his consent and without the consent of his country, Malaysia. The ATO's decision which relates to citizens private rights in law and the sovereign rights of Malaysia over its subjects including its right to tax its subjects and residents, has been violated and abrogated by the unilateral acts of a foreign tax agency.

[42] It was argued rather trenchantly by counsel for the plaintiff that the actions of the ATO are disrespectful to Malaysia and goes against the very grain of the principle of comity of nations. He said by this very reason, Malaysia should not allow Australia to continue to disrespect and trample upon Malaysia's sovereign rights and to infringe upon the constitutional rights of Malaysia's citizens unilaterally without regard to customary international law.

[43] Counsel for the plaintiff said that the acts of the defendants are ultra vires their powers and beyond the jurisdiction of their legislative powers and therefore sovereign immunity has no place in this case. Next, as for the DTA, counsel for the plaintiff submitted that DTA provides the right of recourse in Malaysia to the plaintiff under article 24 and by implication the defendants have waived their immunity if any, and their act of declaring the plaintiff as a resident of Australia despite his objections are indeed matters of the plaintiff's private law. He said that the DTA, gives Malaysia the jurisdiction to hear disputes concerning its subjects. Counsel referred to ss 6 and 136AA of the Income Tax Assessment Act 1936, which make mention of and define the

A International Tax Sharing Treaty and said that this gives recognition of international rights of individuals who are affected to seek the remedies under the treaty. Hence, the treaty being an international agreement, prevails over Australia's domestic tax laws.

B **[44]** Counsel said that the mutual agreement procedure ('MAP') under the DTA provides for a resident of Malaysia who is dissatisfied with the actions by the ATO to present his case to the Malaysian competent authority or invoke the remedies provided by taxation laws in Malaysia which means he has a right to bring the dispute to the Malaysian court. Hence, the remedy for the resident C is either through the court or through the Malaysian competent authority.

[45] Therefore, according to the plaintiff, immunity has been expressly waived in the DTA. It was also submitted for the plaintiff that since the D plaintiff is a Malaysian national, and having his domicile here in Malaysia, it is only appropriate that the Malaysian court decide on the issue of the plaintiff's legal status and change of domicile, and not the Australian court. On the issue of domicile, it was intended that the plaintiff's is reflected in his Malaysian passport, identity card, and birth certificate. The benefits bestowed upon him E as a Malaysian are, inter alia, his eligibility to vote, and the enjoyment of privileges and fundamental liberties under the Federal Constitution as a Malaysian citizen. These benefits and privileges support his intention to maintain Malaysia as his legal domicile. It was argued for the plaintiff that these are Malaysian private law and constitutional matters of a Malaysian citizen F where Malaysia has the sole and exclusive jurisdiction to determine. It was thus contended for the plaintiff that the present case does not attract sovereign immunity because the decision of the ATO is not a governmental act but an act infringing upon a foreign citizen's private law rights and an exercise of extra judicial powers. G

[46] Counsel for the plaintiff, urged the court not to deal with the issue of sovereign immunity summarily as a preliminary issue, but rather that it should be taken up after evaluating the entire factual matrix of the case.

H **[47]** In this regard, reference was made to the decision of the Supreme Court in *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor* [1990] 1 MLJ 475 at pp 477–478; [1990] 1 CLJ Rep 77 at pp 80–81 which puts the obligation on the court to consider the whole context and look into the facts of I the case before deciding if the case is one where sovereign immunity applies. It was argued that the certificate which recognises the Commonwealth of Australia as a sovereign state will only establish that the said country is sovereign, but that in no way means that it is immune from any actions.

ANALYSIS AND CONCLUSION

[48] The doctrine of sovereign immunity (or state immunity) is an integral principle of international law which was developed out of the principle *par in parem non habet imperium.* Thus, under that principle one state shall not be subject to the jurisdiction of another state. Sovereign immunity may be claimed by the state and its servants and agents. Hence where a suit is brought against the servants or agents of a foreign state, the state is entitled to claim immunity for its servants or agents as it could, if sued itself. In *Jones v Ministry of Interior of the Kingdom of Saudi Arabia and another* [2007] 1 All ER 113, Lord Bingham observed:

> ... A state can only act through servants and agents; *their official acts are the acts of the state*; and the *state's immunity in respect of them is fundamental to the principle of state immunity* ... (Emphasis added.)

[49] In Malaysia, the courts have adopted the theory of 'restricted' sovereign immunity rather than absolute sovereign immunity. The rule of sovereign immunity is based on reciprocity and mutual recognition between states. Pursuant to that principle, it is incumbent on this court to honour the underlying foundation behind the rule of sovereign immunity. The relevant case in so far as Malaysia is concerned is the decision of the then Supreme Court in *Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor* [1990] 1 MLJ 475; [1990] 1 CLJ Rep 77; [1990] 1 CLJ 878 ('the *Midford* case'). Prior to the *Midford* case, the position in Malaysia was that 'absolute' sovereign immunity would apply (see: *Village Holdings Sdn Bhd v Her Majesty The Queen in right of Canada* [1988] 2 MLJ 656 (HC)). However, the absolute sovereign immunity theory is no longer applicable and the position now as enunciated in the *Midford* case, is that in Malaysia, the courts are to apply the restrictive sovereign immunity approach.

[50] I turn now to the facts of the *Midford* case and they are as follows. The respondents were Midford (M) Sdn Bhd ('MMSB') and one U.Mat MMSB's counterpart in Australia, Midfort Paramount Pty Ltd together with two of the counterparties directors were charged for conspiracy in a court in Sydney, Australia. The Australian customs department needed documentary evidence which they intended to present to the court in Australia.

[51] Two Australian customs officers came to Malaysia and together with a Malaysian customs officer, raided the offices of MMSB's offices in Kuala Lumpur and Penang and seized documents. Clearly, the provisions of O 66 of the then Rules of the High Court 1980 pertaining to the obtaining of evidence for foreign courts was not complied with. Quite obviously, the raid/seizure were intrusions by these Australian officers into the private office of Malaysian parties and such intrusion took place on Malaysian soil. On application by

MMSB and U Mat, the High Court ordered the Australian customs officers and the Malaysian customs officer to return all documents/files and any copies made of the documents seized by them belonging to MMSB and U Mat. The Director General of Royal Customs, Malaysia and the Commonwealth of Australia applied separately to set aside the order of the High Court. The Commonwealth of Australia raised the plea of sovereign immunity. The High Court refused to set aside the order and an appeal was lodged to the Supreme Court.

[52] The Supreme Court allowed the appeal and upheld the plea of sovereign immunity, holding that the exercise of the functions of the customs arm of the Australian government in the peculiar circumstances of this case could not be classed as *acta jure gestionis*, ie commercial, in accordance with accepted international standards and were therefore *acta jure imperii*.

[53] In that case the Australian government officer had come to Malaysia and raided the offices of a Malaysian entity. Notwithstanding that, the Supreme Court held that the plea of sovereign immunity was sustainable. Thus, despite the transgression of the rights of the Malaysian party on Malaysian territory, the Supreme Court declared that the Commonwealth of Australian (and its officials) are immune from Malaysian legal proceedings because of sovereign immunity.

[54] I turn now to the particular passages in the *Midford* case, where the Supreme Court enunciated the theory of restricted sovereign immunity as follows:

> We now refer to some of the submission of Mr Abraham on the concept of the restrictive theory of sovereign immunity. Counsel referred us to the following passages in the judgment of Lord Wilberforce in *The I Congreso Del Partido*.
>
> The question arises, therefore, what is the position where the act upon which the claim is founded is quite outside the commercial, or private law, activity in which the state has engaged, and has the character of an act done *jure imperii*. The 'restrictive' theory does not and could not deny capability of a state to resort to sovereign or governmental action; it merely asserts that *acts done within the trading or commercial activity are not immune. The inquiry still has to be made whether they were within or outside that activity*.
>
> The conclusion which emerges is that in considering, under the 'restrictive' theory whether state immunity should be granted or not, *the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading for commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.*

Mr Abraham stated that the decided cases and the learned authors of textbooks have discussed the distinction between state-like activities of foreign nations or individual sovereigns (*acta jure imperii*) and their purely commercial activities (*acta jure gestionis*). He concluded that it was clear from those authorities that it was difficult to formulate a clear cut distinction between the two concepts but pointed out that a useful guide could be found in the following passage of the judgment of Lord Edmund-Davies in *The I Congreso* case:

I approach the application of the restricted doctrine of state immunity upon the following basic principles:

II. That propounded in the *Empire of Iran* case, 45 ILR 57, 80 that: '*As a means for determining the distinction between acta jure imperii and jure gestionis one should rather refer to the nature of the state transaction of the resulting legal relationships, and not to the motive or purpose of the state activity. It thus depends on whether the foreign state has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law*.

But it was the submission of Mr Abraham that despite any definitional difficulties in differentiating between *acta jure imperii* and *acta jure gestionis*, in the circumstances of the present case the nature of the acts of the Commonwealth of Australia for the purposes of this appeal might be assumed to be as physically manifested in the form of the acts of the two Australian Customs officers, and cannot be reasonably classified as ' commercial ' within the sense in which this word was used in the *I Congreso* case.

There was, he submitted, in other words, no doubt that the acts in this case were not 'commercial' because the discharge of functions by the Customs arm of a particular government is a well recognised incident of the governance of states in general. It was his submission that the character of that function, and the nature of acts flowing from a discharge of that function could not in any sense be classed as '*jure gestionis*' ie, 'commercial' and are classically '*acta jure imperii*'. Counsel concluded that if reference was made to the above quoted statement of principle by Lord Edmund-Davies in the *1. Congreso* case it was clear that the discharge of functions by the customs arm of a government was something which a private person was not capable of doing, and thus does not have the private law character such as to bring the present proceedings under the heading of *acta jure gestionis*. It followed, he contended, that the present proceedings would not attract the application of the restrictive version of the doctrine of sovereign immunity. (Emphasis added.)

(See: [1990] 1 MLJ 475 at pp 477–478; [1990] 1 CLJ Rep 77 at pp 80–81).

[55] The Supreme Court's conclusion was as follows:

We are therefore of the view that *the restrictive doctrine should apply here* although the common law position of this country could well be superseded and changed by an Act of Parliament later on should our legislature decide to define and embody in a statute the limits and extent of sovereign immunity in this country.

Finally, we have to consider whether the acts complained of were done within the trading

> *or commercial activity of the foreign state, that is, whether they were acta jure gestionis or whether the acts were within the sphere of the governmental or sovereign activity of that state, that is, whether they were acta jure imperii? We were of the view that the acts of the two Australian customs officers considered in the whole context of this case could not be classified as 'trading or commercial' (see The 'I Congreso case [1983] 1 AC 244) and agree with Mr Abraham that the exercise of the functions of the customs arm of the Australian government in the peculiar circumstances of this case could not be classed as acta jure gestionis, ie commercial in accordance with accepted international standards and were therefore acta jure imperii. In applying the doctrine of sovereign immunity, our courts, whether in the exercise of its civil or criminal jurisdiction, should have by international comity disclaimed jurisdiction in this case especially after the production of the certificate from Wisma Putra stating that the Yang di-Pertuan Agung has recognized the Commonwealth of Australia as a foreign state.* In the circumstances and for the reasons stated, we therefore allowed the appeal with costs and set aside the order of the High Court dated 16 September 1988. (Emphasis added.)

(See: [1990] 1 MLJ 475 at p 480; [1990] 1 CLJ Rep 77 at pp 84–85).

[56] Thus the imperative question for the court in the present context is: whether the act(s) of the defendants are of a governmental nature and character or whether they are commercial in nature. In this regard, it is relevant to quote Lord Denning in *Rahimtoola v H E H The Nizam of Hyderabad and Others* [1958] AC 379 at p 422 where he described the theory of sovereign immunity and the test, in the following terms:

> Applying this principle, it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, *but rather on the nature of the dispute*. Not on whether 'conflicting rights have to be decided', but on the nature of the conflict. Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, *the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried out by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.* (Emphasis added.)

[57] The starting point is that the Head of State of the Federation of Malaysia, DYMM the Yang Di Pertuan Agong has issued a certificate to recognise the Commonwealth of Australia as a foreign sovereign state (see: exh D1 of encl 46). However, as rightly pointed out by counsel for the plaintiff, that of itself does not establish sovereign immunity and the court must be satisfied that the actions or conduct of the defendants are of such a nature or character that they fit within the criteria which has been legally recognised as attracting the protection afforded by the doctrine of sovereign immunity.

[58] In this regard, from the defendants' perspective, D1 and D2 have carried out their public duties as taxation officers in the course of administering Australian taxation laws. The fact that they performed 'public duties' is in my view, unquestionable.

[59] Quite clearly, in the present case, the ATO has administered the taxation laws of the Commonwealth of Australia and assessed the plaintiff to tax under those laws.

[60] For his part, the plaintiff had also exercised in Australia (unsuccessfully) his full rights of review in relation to those assessments. D2 is the Agency Head of the ATO which is the regulatory body responsible for administering the taxation laws of Australia. ATO is the Australian equivalent of the Inland Revenue Board of Malaysia ('IRB'). As a comparison, in Malaysia, it is the IRB that determines the tax residency of an individual in Malaysia based on s 7 of the Income Tax Act 1967 ('the ITA'). In Australia, it is D2's duly authorised officers employed in the ATO who determine whether an individual is a tax resident in Australia pursuant to the definition of 'resident' in s 6(1) of the Income Tax Assessment Act 1936 ('the ITAA 1936'). In cases where a taxpayer is a tax resident under the domestic laws of both Malaysia and Australia, the determination by the ATO is made based on the DTA. Under article 24(1) of the DTA, there are provisions providing for an appeal process to any aggrieved party and the plaintiff was entitled to engage the procedure. The plaintiff appears not to have engaged the procedure provided for in article 24(1) and the time available to him to do so has now expired. Article 24(1) of the DTA reads as:

> MUTUAL AGREEMENT PROCEDURE
>
> 1. Where a resident of one of the Contracting States considers that the actions of the competent authority of one or both of the Contracting States result or will result for him in taxation not in accordance with this Agreement, he may, notwithstanding the remedies provided by the taxation laws of those States, present his case to the competent authority of the Contracting State of which he is a resident. The *case must be presented within two years from the first notification of the action*.
>
> 2. The competent authority shall endeavour, if the taxpayer's claim appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with this Agreement. If the claim is made within six years of the end of the year of assessment or year of tax, as the case may be, the solution so reached shall be implemented notwithstanding any time limits in the taxation laws of the Contracting States.

[61] In pith and substance, the argument that was made on behalf of the plaintiff in resisting the plea of sovereign immunity is that it cannot be used as

a shield to protect the defendants from allegedly infringing the plaintiff's personal and private rights. According to the plaintiff, the alleged interference in changing the legal status of the plaintiff, who is a Malaysian national, a non-resident of Australia, and having his domicile in Malaysia, by deeming the plaintiff as a tax resident of Australia and changing his domicile to Australia without his consent is a direct violation to the plaintiff's personal and private rights. According to the plaintiff, this is a matter of personal and private law, and as such the defendants cannot invoke the principle of sovereign immunity.

[62] In so far the status of the defendants is concerned, it is important to emphasize that D2 is the Commissioner of Taxation and the Head of ATO, which is a statutory body in Australia just like the IRB in Malaysia. D2 is appointed by the Governor-General of D3:

(a) the powers and functions of D2 are derived from Parliamentary Acts of Australia, ie Taxation Administration Act 1953 ('the TAA 1953'), ITAA 1936 and Income Tax Assessment Act 1997 ('the ITAA 1997');

(b) the ATO's main role, amongst others, is to administer legislation for taxes, including TAA 1953, ITAA 1936 and ITAA 1997, which contain provisions for tax assessment, collection and recovery of income tax and other tax-related liabilities;

(c) the ATO has similar functions to the IRB. As the head of ATO, D2 supervises the operations of the ATO and general administration of taxation laws in Australia;

(d) all actions of D2 in relation to tax audits, tax investigations, tax assessments and tax collections, inter alia, are undertaken by him or his delegates and authorised officers in a professional capacity and within the powers and authorities conferred on him by the laws of Australia;

(e) D1 is an employee of the Australian Public Service ('APS') and D2, as head of a statutory agency also forms a part of the APS. The powers and functions of D2 are delegated to D1 by D2 in accordance with Australian laws;

(f) similarly, all actions of D1 in relation to tax audits, tax investigations, tax assessments and tax collections are undertaken in his professional capacity and within the powers and authorities delegated to him by D2; and

(g) there is no dispute over the capacity of D1 and D2 in respect of administration of the taxation laws in Australia. D3 is established and governed by the Commonwealth Constitution of Australia (see: exh D1 of encl 21). As I said earlier, D3 is recognised as a foreign sovereign state by His Majesty the Yang di-Pertuan Agong Malaysia (exh D1 of encl 46).

[63] It was submitted by counsel for the defendants that D1 and D2's discharge of functions was something which a private person was not capable of doing, and thus does not have a private law character to bring the present matter under the heading of *acta jure gestionis* (commercial) (see: *Maldives Airports Co Ltd and another v GMR Malé International Airport Pte Ltd* [2013] SGCA 16).

[64] It is important to recall that in the present case, the conduct of the defendants (ATO) which is complained of, took place entirely in Australia and it indisputably pertained to conduct by the tax authorities of Australia, which is an arm or revenue agency or authority of the Australian government. In approaching the question at hand, it is important to bear in mind Lord Denning's observations in *Rahimtoola v H E H The Nizam of Hyderabad and Others* [1958] AC 379 at p 422 where he said that sovereign immunity does not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the *nature of the dispute*. The nature of the dispute in the present case is quite obviously a dispute between the plaintiff and the ATO, pertaining to the ATO's determination of the plaintiff as a tax resident of Australia and the consequent assessment to tax over the plaintiff's Australian sourced income and world-wide income.

[65] In the present case, counsel for the plaintiff submitted that the entire factual matrix and complaints and grievances raised in the OS must be subjected to curial scrutiny before the court could rule on the availability or applicability of the plea of sovereign immunity. He said that the issue of the applicability of sovereign immunity and whether it falls within any of the exceptions cannot be decided by this honourable court as a preliminary issue. Counsel for the plaintiff added that the court must decide whether sovereign immunity applies only after due consideration of all the facts of this case in totality and the merits of the plaintiff's claim.

[66] For my part, I do not think that it is necessary in every case for a detailed factual evaluation to be undertaken. Indeed, even in the *Midford* case the Supreme Court did not conduct an in-depth factual evaluation of the underlying dispute. Thus, in the *Midford* case the Supreme Court did not descend deep into the specifics of the underlying dispute or the 'merits of the case' so to speak. But I will however accept that in certain cases, it may well be necessary to undertake an in-depth evaluation of the underlying facts and circumstances, particularly where the sovereign state is a party to a transaction or contract which is the basis of the dispute in respect of which the plea of sovereign immunity is asserted. In such a case, it may be necessary to conduct the necessary evaluation of facts to elicit the commercial or private law nature of the transaction. But that is not the case here. In the present case, the underlying dispute between the plaintiff and the ATO is straightforward. It is

plainly a tax dispute arising out of a determination by the ATO that the plaintiff is an Australian tax resident and the assessment of the tax payable.

[67] Of course, I must make it clear that nothing that I have said in this judgment is to be construed as an acceptance of the correctness of the acts of D1 and D2 (ATO) in declaring the plaintiff as a tax resident of Australia and/or whether the Commonwealth of Australia is in violation of the DTA and/or whether there has been a proper assessment of the tax payable.

[68] Those issues are to be taken up in the appropriate manner before the proper forum (if at all that is legally possible).

[69] I come now to the crucial question and it has to do with the legal test to determine whether the act(s) in question falls within the sphere of the protective cloak of sovereign immunity. In this regard, the Supreme Court in the *Midford* case postulated that the question to be asked is:

> ... *whether the acts complained of were done within the trading or commercial activity of the foreign state ... or whether the acts were within the sphere of the governmental or sovereign activity of that state ...* (Emphasis added.)

[70] It may be recalled that in the *Midford* case, the Supreme Court held that the acts of the Australian custom officers were carried out in the exercise of the customs authority of the Australian government and could not be classified as commercial in accordance with accepted international standards. Thus, the Commonwealth of Australia's immunity from the proceedings was recognised and accordingly, the Supreme Court disclaimed jurisdiction. Likewise in the present case, D1 and D2 are also members of the Australian Public Service and carried out their functions and duties in accordance with the laws of Australia. Further, a certificate recognising the status of the Commonwealth of Australia had been produced (exh D1 of encl 46).

[71] The acts of D1 and D2 were clearly not 'commercial' as they are plainly a discharge of functions by the ATO which is a statutory body carrying out its obligations of administering the taxation laws of Australia. In my view, the character of ATO's function (ie tax assessment and collection and determination of tax residency) and the nature of acts flowing from a discharge of that function, cannot in any sense be classified as 'commercial'. I am impelled to this view because the ATO's discharge of tax functions was something which a private person was not capable of doing, and thus does not have any private law content or character to bring the present matter under the heading of *acta jure gestionis* (commercial).

[72] I turn to the argument that was taken by counsel for the plaintiff that

sovereign immunity is granted as a matter of courtesy. In this regard, my view is that sovereign immunity is granted, not as a matter of courtesy, but as a matter of law. This proposition may be culled from the speech of Lord Hoffmann in *Jones v Ministry of Interior of the Kingdom of Saudi Arabia and another* [2007] 1 All ER 113 at p 146 where he said at para 101:

> As Lord Millett said in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 at p 1588, state immunity is *not* a 'self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt' *and which it can, as a matter of discretion, relax or abandon. It is imposed by international law without any discrimination between one state and another.* (Emphasis added.)

[73] And as I said earlier, the protection attended by the doctrine of sovereign immunity applies not only to sovereign state but also to the servant or agents of the foreign state (see: *Jones v Ministry of Interior of the Kingdom of Saudi Arabia and another* [2007] 1 All ER 113 at p 130).

[74] Having due regard to the averments in the affidavits on this point and upon applying the relevant legal principles as discussed above, I find that the acts of D1 and D2 were plainly and patently not 'commercial'. In my view, the actions of D1 and D2 are a clear and obvious manifestation of a discharge of functions by the ATO, which is a statutory body tasked with the obligation of administering the taxation laws of Australia. The character of that function (ie tax assessment and collection and determination of tax residency) and the nature of acts flowing from a discharge of that function, are not 'commercial' activities. For purposes of encl 16, it would suffice to say that the dispute between the plaintiff and the ATO, inherently arises out a decision by the ATO to declare the plaintiff as a tax resident of Australia and to assess tax accordingly. As such, the acts of the defendants (ATO) in carrying out their duties under the relevant taxation laws of Australia undoubtedly fall within the category of governmental authority rather than those of a commercial or private action. The actions of the defendants vis a vis the plaintiff, are plainly governmental acts, *acta jure imperii,* which attract sovereign immunity.

[75] For completeness, I should add that the defendants have not to-date waived immunity but rather are asserting sovereign immunity. This may be contrasted with the situation which obtained in the *Maldives Airports Co Ltd and another v GMR Malé International Airport Pte Ltd* [2013] SGCA 16 where the Republic of Maldives was a party to the dispute which arose out of a concession agreement. In that case, the Republic of Maldives was a party to the concession agreement and it contained a clause which waived immunity (see para 18 of the judgment). In that case, the Court of Appeal of Singapore rejected the claim for sovereign immunity on the grounds that the concession agreement between the parties contained a waiver of sovereign immunity and the acts in question were not done in the exercise of state sovereign power but

A the dispute was characterised as one of private law to which private law remedies apply.

[76] I will reiterate that the principle of sovereign immunity exists as a matter of customary international law and does not exist simply as a matter of
B 'courtesy'. Taking into account the issues that were raised, the facts alluded to and the legal arguments that were put forward by the parties, I am satisfied that the defendants (ATO's) actions and conduct which are sought to be impugned by the plaintiff by way of the reliefs sought in the OS, are not 'commercial activities' but rather, they are actions or conduct which are of a governmental
C nature.

[77] The actions/conduct were undertaken or implemented by the ATO, which is not a private entity but a revenue authority of the Government of the Commonwealth of Australia. In my view sovereign immunity plainly applies to
D the facts of the present case. In the result, and in conclusion, I am impelled to the view that the actions of the Government of the Commonwealth of Australia, through the ATO and D1 and D2, which are being impugned by the plaintiff via the OS are immune from the jurisdiction of the courts of Malaysia by reason of sovereign immunity. Consequently, this is a plain and obvious case
E where the OS should be struck out and dismissed. I therefore granted order in terms of encl 16 and struck out and dismissed the OS (encl 2) with costs of RM30,000 (subject to 4% allocator to be paid by the plaintiff to the defendants.

F Order accordingly.

Order in terms of encl 16 granted; originating summons struck out and dismissed with costs of RM30,000 subject to 4% allocator.

G Reported by Fatin Mohd Ismail

H

I